IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: TLI COMMUNICATIONS LLC PATENT LITIGATION	)	
This document relates to ALL member cases	)	MDL No. 1:14md2534 (TSE/JFA)

DEFENDANTS' MEMORANDUM IN OPPOSITION TO TLI'S MOTION FOR MODIFICATION OF THE PROTECTIVE ORDER

Defendants and TLI spent weeks negotiating and, with few exceptions, ultimately agreeing on the terms of the Protective Order that the Court entered last Monday, December 8, 2014. The day *after* the Court entered that Protective Order, TLI approached Defendants and sought to renegotiate the order's terms. Specifically, TLI asked to weaken the protections provided to Defendants' most sensitive and confidential information, including source code, to allow that information to be viewed by multiple "technical advisors" who are foreign nationals on H1-B temporary visas, i.e., individuals subject to the Department of Commerce's technology and software export restrictions.

TLI concedes it never raised this issue during the negotiation of the Protective Order, and it does not claim that anything prevented it from raising it then. Instead, TLI argues there is good cause to allow this amendment now, because: (i) it would be "extremely difficult" to find alternative technical advisors; and because (ii) foreign national technical advisors have been allowed to review some of Defendants' protected information in some other cases under Protective Orders with different terms than the ones to which TLI agreed in this case.

Neither of these arguments provides good cause for amending the previously negotiated, agreed Protective Order, especially in light of Defendants' legitimate concerns about protecting their most sensitive confidential information and avoiding the risk of violating United States export regulations. First, and most significantly, TLI's assertion that it has no alternative to using its foreign national technical advisors is nothing more than that—an assertion. TLI has submitted no evidence in support of this statement. For example, TLI: (a) has not identified *any steps* it has taken to try to identify additional advisors who comply with the terms of the Protective Order, (b) has not specified *a single impediment* it has faced in retaining any such additional advisors, and (c) has not explained why the *seven* U.S. citizens it has also identified as advisors are insufficient. Second, neither the possibility that TLI might have been able to negotiate a different Protective Order than the one it did here nor the fact that a court in a different case thought different Protective Order terms were appropriate is a reason to rescind the protections TLI and Defendants agreed to here.

Accordingly, Defendants respectfully request that TLI's motion be denied in its entirety.

I. BACKGROUND

On October 16, 2014, this Court issued a scheduling order that, among other things, provided the parties with a month to meet and confer on a proposed Protective Order to govern discovery in this MDL. Order ¶ 10 (Docket No. 76). Over the course of that month, the parties met and conferred multiple times to try to reach agreement on the terms of this order, negotiating a set of protections for discovery through compromises on various interrelated issues. *See* Berger Decl. (Docket No. 91); *see also* Ex. 1 to Davidoff Decl. Ultimately, the parties reached agreement on all issues, save three discrete topics—all relating to protections of Defendants' confidential information and source code—that were submitted to this Court for resolution on November 17, 2014. (Docket Nos. 92, 94).

Paragraph 7(F) of the parties' proposed Protective Order states that, among other things, "No Protected Information may . . . be made available to any foreign national who is not

(i) lawfully admitted for permanent residency in the United States or identified as a protected individual under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).” Order ¶ 7(F). The language of Paragraph 7(F) is drawn directly from 15 C.F.R. § 734.2(b)—an export regulation of the Department of Commerce—which states in relevant part that:

> (ii) Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or countries of the foreign national. This deemed export rule does not apply to persons lawfully admitted for *permanent* residence in the United States and does not apply to persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)).

Order ¶ 7(F) (emphasis added). The language of Paragraph 7(F) was agreed to by all parties, including TLI.

On December 4, 2014, this Court issued an order resolving the outstanding disputes regarding the proposed Protective Order (Docket No. 119), and on December 8, 2014 entered the final Protective Order in this matter (Docket No. 128), including Paragraph 7(F).

On December 9, the day after the Court entered the Protective Order, counsel for TLI contacted Defendants asking them to agree to ignore or alter Paragraph 7(F) to allow non-permanent resident foreign nationals to view protected information, including one associate at TLI’s counsel’s law firm. *See* Ex. 10 to Berger Decl. at 3-4 (Docket No. 139-10). TLI further stated that: “Because of the time sensitive nature of this issue, we plan to move the Court for relief this week if the parties are unable to reach agreement on this issue.” *Id.* In essence, TLI expected Defendants to immediately drop a provision of the negotiated Protective Order or be subjected to the additional burden of responding to this discovery motion.

On December 10, TLI identified five technical advisors who are U.S. citizens and seven who are legal non-permanent residents on H1-B visas—all employees of iRunway, a technical consulting firm that TLI has apparently employed. *Id.* at 3. On December 11, TLI identified an additional U.S. citizen and an additional legal non-permanent resident as technical advisors. *Id.* at 2. On December 16, TLI identified another U.S. citizen as a technical advisor, bringing its total number of disclosed U.S. citizen advisors to seven. *See* Ex. 2 to Davidoff Decl., at 1.

Defendants responded to TLI by explaining their concerns with allowing non-permanent resident foreign nationals to view their code. *Id.* They asked TLI instead to use the U.S. technical advisors it had already identified and, if needed, identify additional advisors who comply with the Protective Order. *Id.* TLI declined to do so. TLI filed the current motion on December 12, 2014. Subsequently, the parties continued to discuss possible ways to address this issue, and reached a compromise with respect to the associate at TLI's counsel's law firm, which will allow him to see Protected Information other than source code. *See* Ex. 3 to Davidoff Decl., at 1.

II. ARGUMENT

Courts are generally reluctant to modify stipulated Protective Orders after they have been entered absent a compelling reason. *See Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978) (per curiam) (noting that, "where a protective order is agreed to by the parties before its presentation to the court, there is a higher burden on the movant to justify modification of the order"); *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 562 (2d Cir. 2005) ("Once a court enters a protective order and the parties rely on that order, it cannot be modified 'absent a showing of improvidence in the grant' of the order or 'some extraordinary circumstance or compelling need.'") (citations omitted); *SmartSignal Corp. v. Expert Microsystems, Inc.*, No. 02 C 7682, 2006 WL 1343647, at *2 (N.D. Ill. May 12, 2006) ("It follows that Defendant must make a strong showing of good cause before this Court will modify the stipulated protective order."). Here, TLI has proffered no compelling reason for modifying the terms agreed to by the parties and entered by the Court, let alone a reason that would justify the potential harm to Defendants from that amendment.

A. Modifying the Agreed Order Is Unfair and Potentially Harmful to Defendants.

Modifying the Protective Order to delete the protections Defendants received in Paragraph 7(F) is problematic for several reasons.

Most significantly, TLI's proposed change weakens the protections afforded Defendants' "crown jewel" source code. *See buySAFE, Inc. v. Google Inc.*, No. 3:13-cv-781-HEH, 2014 WL 2468553, at *2 (E.D. Va. June 2, 2014); *Catch A Wave Techs. Inc. v. Sirius XM Radio, Inc.*, No. C 12-05791, 2013 WL 9868422, at *1 (N.D. Cal. Aug. 6, 2013). TLI has accused—and is seeking to review source code and protected information relating to—a wide array of technology programs, including the source code to portions of the iPhone, YouTube, Facebook, Google Drive, Twitter, and Dropbox. The use of such source code for non-litigation purposes could put Defendants at a serious commercial disadvantage. *See, e.g.*, *MagicJack VocalTec, Ltd. v. NetTalk.com, Inc.*, No. 9:12-cv-80360-DMM, slip op. at 2 (S.D. Fla. Oct. 18, 2012) (Dkt. 51) ("[A]ny improper use of the source code has the potential to be fatal to Defendant's business."), Ex. 4 to Davidoff Decl.; *Adobe Sys. Inc. v. Macromedia, Inc.*, No. 00-743-JJF, 2001 WL 1414843, at *1 (D. Del. Nov. 5, 2001) ("[T]he source codes of a software company . . . are of critical importance to its business and must be provided the highest form of protection a court can provide in the context of a particular case."). Defendants are understandably concerned about the security of this information and have both negotiated for and—where needed—litigated over the protections in the current Protective Order. These protections are meant to ensure that TLI's access is permitted only under tight controls that reduce the risk of such information being exposed, even inadvertently. The restriction on the viewing of code by foreign nationals who are not permanent residents is just such a protection—and it is one to which TLI agreed. Moreover, at the time TLI negotiated over the Protective Order and agreed to this provision, TLI presumably had engaged its consulting firm, iRunway, and knew (or should have known) that some of its technical advisors were non-permanent resident foreign nationals.

A significant difference between a non-permanent resident foreign national with an H1-B visa and a permanent resident (or United States citizen) is that in most circumstances the H1-B holder will necessarily leave the U.S. and return to his or her country of origin. An H1-B visa is a three-year visa, which may be extended to six years, that applies only while the holder is employed in the U.S. *See United States v. Biheiri*, 299 F. Supp. 2d 590, 594 (E.D. Va. 2004) ("An H1-B visa allows an alien to work in the United States for up to six years."). At the end of this period—including if the person's employment ends—the individual must leave the United States, unless a further extension is granted. *See* U.S. Citizenship & Immigration Services, Entrepreneur Visa Guide, Immigrant Visas, *available at* http://www.uscis.gov/eir/visa-guide/entrepreneur-visa-guide#Immigrant (last visited Dec. 17, 2014). Accordingly, if H1-B visa holders are allowed to view Defendants' confidential information, Defendants will almost certainly be in a situation where a foreign national will have viewed Defendants' sensitive information and returned to his or her country of origin where enforcement of a U.S. Protective Order will be difficult or impossible.[1] Thus, Defendants will be left with little or no recourse to prevent or rectify that individual's disclosure of information, even if it is through inadvertence or misunderstanding.

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[1] The technical advisors at issue here are citizens of India and China. *See* Ex. 5 to Davidoff Decl. at 1.

This problem is only compounded here by the fact that, to date, TLI has already proposed to have *eight* such individuals review Protected Information, and its proposed amendment would allow it to add more. Regardless of how well-intentioned and conscientious all parties involved are, it is plain that granting this permission can only increase the risk of significant harm to Defendants.

In addition to these risks, allowing TLI's proposed amendment presents the additional complication of potentially allowing the violation of Department of Commerce export regulations. Allowing H1-B visa holders to view source code, even in the United States, is considered exporting that information—a so-called "deemed export." *See* 15 C.F.R. § 734.2(b) (2014) ("Any release of technology or source code subject to the EAR to a foreign national. Such release is deemed to be an export to the home country or countries of the foreign national."). Exports of certain types of source code—for example, code relating to encryption—is subject to embargo or license requirements. *See* 15 C.F.R. § 742.15 (2014); *see also* Bureau of Industry & Security, Frequently Asked Questions, *available at* http://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs (last visited Dec. 17, 2014). Defendants do not, at this time, know whether some or all of the source code at issue in this case is subject to these export restrictions—to make such a determination requires time and regulatory expertise. *See, e.g.*, Commerce Control List – Index, 15 C.F.R. § 774, Supp. 1 – Index 1 (2014), *available at* http://www.bis.doc.gov/index.php/forms-documents/doc_download/993-index-ccl (last visited Dec. 17, 2014) (41-page index of "controlled items" subject to export regulations). And that is exactly the point. At this "significant juncture of the Action," as TLI calls it, *see* Br. at 6, requiring Defendants to incur the time and expense of making export control regulatory determinations (or incur the risk of not making such determinations) is unduly burdensome and, frankly, unfair. Defendants have other pressing obligations—ongoing discovery, claim construction briefing, preparations for a *Markman* and dispositive motion hearing in January, followed closely by expert reports. Defendants should not be subjected to the burden of committing additional time and resources to address a problem of TLI's making, particularly given that the Protective Order was drafted to avoid this problem by restricting the viewing of code to individuals whose viewing will not be a "deemed export."

B. TLI Has Provided No Evidence To Support Its Purported Need for a Modification.

TLI says that, notwithstanding its previous agreement and the potential harm to Defendants from now redoing that agreement, a modification of the Protective Order is needed because, "it would be extremely difficult if not impossible for TLI to find and replace iRunway, or the Technical Advisers, with other consultants having the same capabilities and expertise." Br. at 6. That is all TLI says on this subject. It offers no explanation of why this is so. It provides no evidence of what steps (if any) it has taken to try to secure alternative advisors or to contact additional consulting companies. And it does not identify a single impediment it has faced in retaining alternative technical advisors. Indeed, in its accompanying declaration in support of its motion, TLI provides no factual information at all about steps TLI or iRunway have taken to try to address this issue, short of demanding Defendants agree to change the Protective Order the day after it was entered and then approaching the Court three days after that.

Further, the timing here weighs against penalizing Defendants for TLI's failure to address this matter during the Protective Order negotiations. While TLI does not tell the Court when it retained iRunway or when it asked iRunway to begin identifying technical advisors, TLI presumably had retained iRunway well before the Protective Order negotiations concluded, especially given that TLI now argues that it would be difficult to retain additional advisors "at this significant juncture" in the case. In any event, TLI has certainly had ample time to line up its advisors. It filed suit against Defendants over a year ago, and presumably it was (or at least should have been) preparing to file suit even before then. There is no apparent reason, therefore, that TLI could not have raised this issue during the Protective Order negotiations (or prepared itself to avoid the issue by lining up compliant advisors). Alternatively, if TLI waited until after the negotiations of the Protective Order—more than a year into the pendency of this case—to locate its technical advisors, it should not now be not be heard to complain. In such instance, TLI would have waited two weeks before Christmas to find advisors, and it is not surprising that that its options may now be limited. In all events, Defendants should not have to bear the consequences of TLI's ill-timed request.

Moreover, TLI's assertion of the impossibility of doing code review by non-foreign nationals is difficult to credit. It has already identified *seven* technical advisors who *do* meet the criteria of the Protective Order. Defendants have not objected to any of those individuals, and there is no reason those individuals could not begin their review of Protected Information immediately, under the terms and conditions of the negotiated Protective Order.[2] TLI does not say why that is insufficient. Nor is it clear how TLI could make such a statement—it has not even tried to use those individuals. To date, not a single Defendant has a received a request from TLI to review source code. TLI is, in other words, telling the Court it is impossible to do something that it has not even tried. That is neither a compelling justification nor good cause.

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[2] The only possible exception to this statement is the individual disclosed yesterday, December 16, whose disclosure materials Defendants have not yet had sufficient time to review.

C. Protective Order Terms From Other Cases Are Not Dispositive Here.

TLI devotes a fair amount of space in its brief to arguing that its proposed technical advisors have reviewed Defendants' code in other cases and that other courts in other cases (sometimes involving certain Defendants) have entered Protective Orders that did not restrict foreign nationals.[3] All of that is beside the point. When parties negotiate and courts adjudicate the terms of a Protective Order, they balance the protection of one side against the other side's desire to procure necessary discovery. The result of this balancing is a Protective Order suited to the needs of the particular case at issue. *See Pikes Peak Family Hous., LLC v. United States*, 40 Fed. Cl. 673, 683 (1998) ("Thus, courts craft protective orders to meet the singular needs of each individual case[;] . . . [i]n short, every protective order is *sui generis*, the product of a unique balancing of competing interests viewed against the totality of the circumstances."). The entering of a protective order is not the creation of a menu of available provisions from which TLI (or any other party) can pick at random and impose on a defendant in another case. Thus, that one of the Defendants may have negotiated an order to allow certain portions of its code to be viewed in certain contexts, or that a court found foreign national restrictions unnecessary in another context, are not particularly illuminating here. Here, there are a large number of Defendants, with a variety of products, and an understandable degree of sensitivity about their source code. Here, there is a Protective Order that the parties have *already agreed upon* and that the Court has *already entered*. And here, there is a plaintiff who, after that order was entered, on the eve of the holiday season, claims (without evidence) that it simply *must* be allowed to use

[3] TLI also argues that certain Defendants' employment practices vis-à-vis H1-B visa holders are somehow relevant to the terms of a Protective Order. This is grasping at straws. The policies and procedures Defendants use in hiring (which TLI knows nothing about) have no relevance to the proper restrictions that should be imposed on Defendants' litigation adversary.

eight H1-B visa holders in addition to the seven U.S. citizens it has identified to review Defendants' code. There is nothing about the situation *here* that requires relief.

In any event, TLI reads too much into the access provided in these other cases. In at least of one those cases, *Bascom Research, LLC v. Facebook, Inc.*, Case No. 3:12-cv-06293-SI (N.D. Cal.), the only reason any of these individuals accessed the code was because the plaintiff there (not TLI) failed to disclose the immigration status of that individual, precluding the defendant, Facebook, from objecting to him. The protective order in that case also prohibited disclosure of material subject to export control to a foreign national. (*See* Patent Local Rule 2-2 Interim Model Protective Order for the U.S. District Court for the Northern District of California ¶ 14.3, *available at* http://www.cand.uscourts.gov/model-protective-orders.) Had this individual's status as a non-permanent resident foreign national been disclosed to Facebook, Facebook would have objected to his review of source code, exactly as it is objecting now.

Moreover, in another of those cases, at least one of the individuals was never approved by the defendant, Dropbox, to see its confidential information. In the CV of Mr. Vijh, he says that he worked on one case involving Dropbox, namely, *PersonalWeb Technologies LLC v. Amazon.com, et al.*, Case No. 6:11-cv-00658-LED (E.D. Tex.). *See* Ex. 7 to Berger Decl. at 2 (Docket No. 139-7). Dropbox was a defendant in that case, but it never assented to Mr. Vijh having access to its protected materials. In that case, Dropbox was dismissed without prejudice in April 2013, well before Mr. Vijh signed the protective order's Confidentiality Agreement in November 2013. *See* Ex. 6 to Davidoff Decl. (Order of Dismissal dated Apr. 15, 2013); Ex. 7 (Attachment A to *PersonalWeb* protective order signed by Mr. Vijh on Nov. 29, 2013); Ex. 8, at 16 (*PersonalWeb* Protective Order, stating in Part 3.B that "No disclosure of Protected Information to a Technical Advisor . . . shall occur until that person has signed . . . Attachment

A, and a signed copy has been provided to that producing party . . . ."). Thus, if Mr. Vijh reviewed Dropbox's protected information, that review was done in violation of the Protective Order entered in the *PersonalWeb* case. And, if he did not, TLI then was wrong to suggest to this Court that Dropbox assented to his review of their protected information. Br. at 6; Ex. 10 to Berger Decl., at 3 (Docket No. 139-10).

Thus, at least some of the cases cited by TLI suggest that despite the parties' best intentions here, loosening the protections of the parties' agreed-upon Protective Order is not without significant risk.

III. CONCLUSION

In the end, Plaintiff negotiated the Protective Order with full knowledge of its needs to review source code, and Defendants' concern for protecting their companies' crown jewels. Balancing these concerns, it agreed to a compromise that it should honor. For the foregoing reasons, Defendants respectfully request that the Court DENY TLI's motion for modification of the Protective Order.

Dated: December 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2014, I will electronically file the foregoing DEFENDANTS' MEMORANDUM IN OPPOSITION TO TLI'S MOTION FOR MODIFICATION OF THE PROTECTIVE ORDER with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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